

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARIA DAHILIG</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,035,867
<b>USD 475</b>	)	
Respondent	)	
AND	)	
	)	
<b>KANSAS ASSOCIATION OF SCHOOL BOARDS</b>	)	
<b>WORKERS COMPENSATION FUND, INC.</b>	)	
Insurance Fund	)	

**ORDER**

Respondent and its insurance fund appealed the November 8, 2007, preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

**ISSUES**

Claimant alleges she injured her right arm and shoulder working for respondent as a food server at one of respondent's schools. Respondent initially accommodated claimant's work restrictions. But in late May 2007 respondent terminated claimant's employment when it declined to renew her contract. In the November 8, 2007, preliminary hearing Order, Judge Benedict awarded claimant temporary total disability benefits.

Respondent and its insurance fund contend the preliminary hearing Order should be reversed. They argue respondent was willing to accommodate claimant's work restrictions until her job performance caused respondent to terminate her employment. Their argument may be summarized as follows:

Respondent was more than willing to accommodate Claimant's work restrictions, and in fact stated that even if Claimant's restrictions had been increased, Respondent would still have accommodated Claimant's restrictions. (PH at 37-38). Respondent simply could not continue to employ Claimant in that Claimant was an unreliable employee and needed to be constantly monitored. (PH at 48-49). Claimant was terminated for cause, and but for Claimant's poor work performance, Claimant still would be employed in an accommodated position with

Respondent. Thus, Claimant does not meet the definition of one who is “temporarily and totally disabled” and temporary total benefits should have been denied to Claimant.<sup>1</sup>

In addition, respondent and its insurance fund contend Judge Benedict awarded claimant temporary total disability benefits after finding they had failed to prove claimant acted in bad faith, which they contend is an erroneous interpretation of the law.

Conversely, claimant contends this appeal should be dismissed for lack of jurisdiction. Claimant questions the Board’s authority at this juncture to review a preliminary hearing finding that she meets the statutory definition of being temporarily and totally disabled under K.S.A. 44-510c. In the alternative, claimant argues the Board should affirm the preliminary hearing Order as the “record supports the conclusion that claimant is temporarily and totally disabled.”<sup>2</sup>

The issues before the Board on this appeal are:

1. Does the Board have the jurisdiction and authority at this juncture of the claim to determine whether claimant satisfies the definition of being temporarily and totally disabled?
2. If so, is claimant temporarily and totally disabled?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the undersigned finds and concludes this appeal should be dismissed.

Respondent and its insurance fund do not dispute that claimant injured her right arm and shoulder at work. But they do challenge that claimant is entitled to receive temporary total disability benefits for that injury when respondent could allegedly accommodate claimant’s injury and any resulting temporary work restrictions she might be given. Respondent and its insurance fund presented evidence that respondent accommodated claimant’s right upper extremity injury until it decided that claimant’s contract should not be renewed due to poor job performance. Conversely, claimant testified as to how some of her job performance issues were related to her injury.

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<sup>1</sup> Respondent’s Brief at 3 (filed Dec. 17, 2007).

<sup>2</sup> Claimant’s Brief at 2 (filed Jan. 4, 2008).

In an appeal of a preliminary hearing award, the Board does not have the authority or jurisdiction to review a preliminary hearing finding that claimant satisfies the definition of being temporarily and totally disabled. Reviews of preliminary hearing awards are limited as the Workers Compensation Act specifically restricts the Board's review of those awards to the following issues:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim?
- (4) Any other finding that goes to the compensability of the claim?<sup>3</sup>

In addition, the Board has the jurisdiction to review those preliminary hearing orders in which a judge has exceeded his or her jurisdiction or authority.<sup>4</sup>

There is no question that Judge Benedict had the authority at the preliminary hearing to determine whether claimant was temporarily and totally disabled and, therefore, entitled to receive temporary total disability benefits. Consequently, the Judge did not exceed his jurisdiction.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>5</sup>

Moreover, the Judge's finding does not pertain to one of the jurisdictional issues the Board can review under K.S.A. 44-534a.

In conclusion, this appeal should be dismissed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>6</sup> Moreover, this review of a

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<sup>3</sup> K.S.A. 44-534a.

<sup>4</sup> K.S.A. 2006 Supp. 44-551.

<sup>5</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

<sup>6</sup> K.S.A. 44-534a.

preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, the undersigned dismisses this appeal.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February, 2008.

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KENTON D. WIRTH  
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent and its Insurance Fund  
Bryce D. Benedict, Administrative Law Judge